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No. 04-5462

In the Supreme Court of the United States

RONALD ROMPILLA, PETITIONER

v.

JEFFREY A. BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS

(CAPITAL CASE)

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

CHRISTOPHER A. WRAY
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

TRACI L. LOVITT
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

The United States will address the following question:

Whether capital defense counsel renders ineffective assistance under the Sixth Amendment to the Constitution where, after hiring three mental health experts to evaluate the defendant, interviewing the defendant himself, three of his siblings, his ex-wife and his sister-in-law, and uncovering no mitigation evidence from the investigation, counsel concludes that further investigation into the defendant's background is unwarranted.

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INTEREST OF THE UNITED STATES

Claims of ineffective assistance of counsel alleging inadequate investigation are frequently asserted on collateral review in federal criminal cases. Although this case involves a claim by a state prisoner under 28 U.S.C. 2254, the Court's analysis will likely affect federal prisoners' ineffectiveness claims under 28 U.S.C. 2255. The United States therefore has a substantial interest in the resolution of the question presented. The government has previously participated in numerous cases raising similar ineffective assistance of

counsel questions. See, *e.g.*, *Wiggins* v. *Smith*, 539 U.S. 510 (2003); *Bell* v. *Cone*, 535 U.S. 685 (2002); *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000); *Strickland* v. *Washington*, 466 U.S. 668 (1984).

STATEMENT

1. On January 14, 1988, the body of James Scanlon was found lying in a pool of blood in his bar, the Cozy Corner Cafe, in Allentown, Pennsylvania. Scanlon had been repeatedly stabbed in the back, head, and neck, and his body had been set on fire.[1] His wallet had been stolen, as well as approximately $500 to $1000 from the bar. A police investigation revealed that the assailant had used a window in the men's bathroom to enter after the bar had closed. J.A. 1283.

Petitioner was seen in the Cozy Corner Cafe from approximately 1:00 a.m. to 2:00 a.m. on the night of Scanlon's murder. During that time, he was observed going into the men's bathroom roughly ten times. Although petitioner claimed that he left the bar between 2:00 a.m. and 2:30 a.m. to have breakfast after spending all but $2.00, a cab driver testified that he drove petitioner from a diner to the George Washington Motor Lodge, and petitioner paid the more-than-$9 fare in cash. At the motel, petitioner used a false name to rent a room for two nights, paying $121 in cash and flashing a large amount of cash to the desk clerks. J.A. 1283-1284.

During a search of petitioner's motel room, police found bloody sneakers. The treads on the sneakers matched those in a bloody footprint near Scanlon's body, and the blood on the sneakers matched Scanlon's

[1] No forensic evidence suggests that Scanlon was alive when set on fire. See J.A. 93

blood type. A motel groundskeeper later discovered Scanlon's wallet in some bushes that were six to eight feet outside of petitioner's room. Petitioner's fingerprint was also found on one of two knives used to commit the murder. J.A. 1283-1284.

2. Petitioner was charged with Scanlon's murder and related crimes, and the prosecution sought the death penalty. After a jury trial, petitioner was found guilty of first degree murder, burglary, criminal trespass, theft, and receiving stolen property. J.A. 1283 & n.1.

During the sentencing phase, the prosecution attempted to prove three aggravating factors: (1) petitioner committed the murder while perpetrating a felony, *i.e.*, the burglary and robbery of the bar; (2) petitioner committed the murder by means of torture, *i.e.*, repeatedly stabbing Scanlon in the neck and back of the head while he was alive and conscious; and (3) petitioner had a significant history of felony convictions involving the use or threat of violence, *i.e.*, raping and robbing a female bar owner after her bar had closed. J.A. 1328, 55-89, 93-99.

Defense counsel attempted to invoke the sympathy of the jurors and any lingering doubt they may have had about petitioner's culpability for the murder.[2] Two of petitioner's brothers, petitioner's sister, and his sister-in-law begged for petitioner's life and testified that

[2] Defense counsel suggested at trial that someone else had murdered Scanlon, and during its deliberations, the jury asked the court about the standards for accomplice liability (which the court did not provide because of the absence of any accomplice-liability charge). Based on the jury's question, counsel made a strategic decision during sentencing to argue that the jury likely had lingering doubts about petitioner's precise role in the murder. J.A. 636-643.

they did not believe petitioner was guilty of murder, that they loved him, and that petitioner was a good family member. In addition, petitioner's 14-year-old son testified that he loved his father and would visit him if he were imprisoned. J.A. 124, 131, 136, 138, 144, 145, 147-148, 157-160.

The jury unanimously sentenced petitioner to death. It found the three aggravating circumstances alleged by the prosecution and two mitigating factors—"[petitioner's] son being present" and the possibility of rehabilitation—and concluded that the aggravating circumstances outweighed the mitigating factors. The Pennsylvania Supreme Court affirmed the conviction and sentence on direct appeal. J.A. 228, 241-256.

3. a. In December 1995, petitioner sought post-conviction relief under the Pennsylvania Post-Conviction Relief Act (PCRA), 42 Pa. Cons. Stat. Ann. §§ 9541 *et seq.* (West 1998). In those proceedings, petitioner raised numerous claims, including that his lawyers had rendered ineffective assistance by failing to conduct a complete investigation into his mental impairments and background. J.A. 262.

During the PCRA hearing, petitioner supported his claim with the testimony of two expert witnesses: Dr. Barry Crown, a psychologist who testified that petitioner has brain damage that likely dates from his childhood, if not to his development in utero; and, Dr. Carol Armstrong, a neuropsychologist who concluded that petitioner has an organic brain impairment. In addition, two of petitioner's sisters who claimed that they had not been interviewed by defense counsel (J.A. 769-770, 814), and one of his brothers, who was interviewed by counsel but claimed that he was never asked about the family background (J.A. 790-791, 798-799), testified that petitioner's parents were alcoholics;

that petitioner's mother drank while pregnant with petitioner; that petitioner's father physically abused petitioner; that petitioner was locked in an outdoor dog pen as a child; and that petitioner was an alcoholic. J.A. 262, 747-752, 757-760, 778, 780-793, 794-804, 805-823.

The two attorneys who represented petitioner at trial—Frederick Charles, the Chief Public Defender for Lehigh County at the time of petitioner's trial, and Maria Dantos, then a full-time assistant public defender with two years of experience—testified at length about their investigation into petitioner's mental state and background. J.A. 464-537, 546-587, 632-745.

With respect to petitioner's mental capabilities, Charles testified that he sent petitioner to "the best forensic psychiatrist around here, to [another] tremendous psychiatrist and a fabulous forensic psychologist." Charles testified that he relied on the experts to administer tests to determine whether petitioner suffered from brain damage or a personality disorder; to request any information that in their view was necessary to evaluate petitioner; and to determine whether petitioner was withholding information about his family life or alcohol use. J.A. 660-661, 664, 671-677, 680-681, 684-685.

The three mental health professionals who examined petitioner pre-trial—Drs. Gross, Cooke, and Sadoff—all testified that their examinations revealed nothing useful to the defense. Dr. Gross concluded that, although petitioner exhibited some evidence of antisocial behavior, "[t]here was no other evidence for underlying psychiatric or mental disorder." "There was nothing at all in [his] interview that suggested [petitioner] had a cognitive impairment at all. So as far as I was concerned, there was no reason to go into anything other than what was very straightforward about this case."

Dr. Gross added that he did not see anything in petitioner's school, medical, or prison records that "would have changed [his] opinion." J.A. 1029, 1045.

Dr. Cooke testified that, although he had not retained his evaluations of petitioner, he was certain that he would have tested petitioner's IQ. In addition, he knew that petitioner's IQ must have been above the mentally-retarded range, because if that test had indicated mental retardation, he would have ordered further testing, but he had not. Dr. Cooke concluded that he had found nothing in his testing of petitioner "that [he] felt could be helpful" to petitioner's case. J.A. 1068-1071, 1076.

Dr. Sadoff testified that his evaluation of petitioner also revealed "nothing favorable" to the defense. When asked whether he typically requests records in a case like petitioner's, the doctor responded "[n]ot necessarily," explaining that "[i]f he gives you an average background and he has an average IQ and everything looks pretty normal and you have no reason to suspect a discrepancy, you might not ask for anything more, especially if you have particular questions that you are asked to address." J.A. 1122, 1130.

With respect to petitioner's background, Dantos testified that she "discussed the family dynamics and what [petitioner's] family relationship was with his parents" with petitioner, three of his siblings, his ex-wife, and his sister-in-law, and there was no indication "that there was any sort of abuse within the family." When Dantos asked petitioner about school, he told her "[t]hat there was nothing unusual about it." Petitioner admitted to Dantos that he drank alcohol but denied that he was an alcoholic, claiming to have consumed only "three or four beers" on the night of Scanlon's murder. Likewise, "there was nothing exceptional presented to [her] about drinking within the family." Dantos explained that she had no reason to doubt the information provided by petitioner and his family, because her relationship with them was "very close," and she and petitioner had "developed a relationship of trust." J.A. 494-495, 498-501, 555, 557-558, 563-564, 566, 584.

Charles similarly testified that petitioner and his family members had responded to questions about petitioner's childhood by saying that he was not abused and his childhood was normal. Charles was also told that petitioner was not an alcoholic, and while not a good student, petitioner claimed to have had a typical educational background. J.A. 677-678, 721-722, 668-671, 733-736, 737. Nothing in petitioner's or his family's manner of answering questions suggested to Charles that they were in denial or withholding information:

> [We would ask] "[i]s there anything that happened? What was it like growing up? Is there anything you can tell us that could help us?" And he said, "No, there was nothing wrong." He was very, very, smooth about it. It wasn't that he was reluctant to talk about anything. * * * There was no indicator from anything he told us that would send us searching for * * * any kind of records. He said everything was fine. He had a normal childhood. There was nothing there. * * * I remember [Dantos] specifically going one by one and talking to him. "Is there anything you can tell me? Tell me about yourself. Tell me about your background." She was, you know, meticulous to cover points.

J.A. 668-669; see J.A. 669 (describing interviews with family).

Petitioner's denials of abuse and alcoholism were further corroborated by his mental health experts. According to Dr. Gross, petitioner "denied any abuse as a child, by either parent" and claimed to have "a good relationship with his father." Petitioner described to Dr. Gross a "fairly normal childhood except for the fact that he didn't like school, which he left in the ninth grade. So what he described to me was really unremarkable in terms of his childhood upbringing." Petitioner also denied drinking heavily. J.A. 1027, 1054.

The state court denied post-conviction relief, holding that "counsel had a reasonable basis for proceeding as they did during the penalty phase." The court concluded that defense counsel's investigation into petitioner's mental capabilities was reasonable, because counsel hired three well-qualified mental health experts who concluded that petitioner had "no organic brain damage" and found "nothing that could be used in mitigation." The court refused to fault defense counsel for failing to acquire petitioner's records and provide them to the experts, observing that "these experts did not request them." In addition, the court held that counsel's investigation into petitioner's background was reasonable, because defense counsel specifically interviewed petitioner and three of his siblings about their family background but learned nothing that "was particularly useful, nor was it consistent to what [petitioner] now says was his background." The court rejected the argument that petitioner's family members were not asked about abuse in the family, expressly crediting the testimony of defense counsel "that they spoke with members of the family in a detailed manner and that what now is claimed by them in support of [petitioner's PCRA challenge] was not revealed to defense counsel at the time of trial." J.A. 263, 264.

b. The Supreme Court of Pennsylvania affirmed. The court agreed that defense counsel's investigation was reasonable in light of the facts that "the experts found nothing helpful to [petitioner's] case," and "none of the family members revealed abuse or other circumstances that could be used as mitigation evidence." J.A. 272-273. Moreover, the court held that "counsel reasonably relied upon their discussion with [petitioner] and upon their experts to determine the records needed to evaluate his mental health and other potential mitigating circumstances." J.A. 272.

4. In June 1999, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2254 in the United States District Court for the Eastern District of Pennsylvania. Noting that its decision was "a very close call" and that "trial counsel were intelligent, diligent and devoted to their task of representing [p]etitioner," the district court held that defense counsel were ineffective, because they "had reason to know of [p]etitioner's past and should not have relied on defendant alone or his family to reveal the true nature of his background." In the district court's view, "there were pretty obvious signs, at least superficially from what counsel knew of [p]etitioner's criminal past, including his rape conviction, that [p]etitioner may have had a drinking problem, may have had a poor school record, and probably had a difficult childhood." J.A. 1298, 1307, 1308.

5. a. A divided panel for the Third Circuit reversed. Applying the standard of review defined in 28 U.S.C. 2254(d)(1), the court of appeals held that the "Pennsylvania Supreme Court's conclusion that trial counsel acted reasonably and rendered effective assistance was not an unreasonable application" of, or in conflict with, Supreme Court precedents. The court observed that

"[t]he findings of the PCRA court and uncontradicted testimony at the PCRA hearing establish that trial counsel conducted an extensive investigation for mitigating evidence." Specifically, "trial counsel got to know [petitioner] well during the course of their representation and established a good relationship with him"; counsel "questioned [petitioner] about his background but [he] provided no useful information or leads"; "[t]rial counsel also spoke to three of [petitioner's] siblings, as well as a sister-in-law and [petitioner's] ex-wife * * * * 'in a detailed manner,' but they did not allude to any of the new evidence adduced at the PCRA proceeding." Finally, counsel "retained three well-qualified mental health experts to examine [petitioner]," but all three found "nothing useful" for the defense. J.A. 1357-1358.

The court rejected petitioner's argument that his attorneys were deficient for failing to interview additional family members, observing that counsel did interview three siblings—one of whom "knew about the conditions in the home," and two others who "must have been aware of the lurid conditions in the family home"—but none hinted about family abuse. On these facts, the court concluded, it was "not constitutionally ineffective for trial counsel to fail to anticipate that interviewing [additional siblings] would have yielded important new information about the family home." J.A. 1358-1359, 1372.

With respect to petitioner's argument that counsel failed to acquire petitioner's records, the court of appeals held that counsel reasonably concluded that the records were "not promising avenues of investigation," given counsel's interviews with petitioner and his family, and the experts' evaluations. In this respect, the court emphasized that counsel "w[ere] permitted to

rely on statements made by their client in deciding on the extent of the investigation that should be conducted in particular areas." J.A. 1360.

Finally, the court of appeals rejected petitioner's argument that defense counsel were ineffective in light of *Wiggins* v. *Smith*, 539 U.S. 510 (2003), which held that defense counsel conducts an unreasonable investigation where the available evidence suggests that additional investigation would be fruitful. The court stated that "*Wiggins* [wa]s critically different from the present case," because "the attorneys in *Wiggins* did little to investigate their client's background although they possessed information that should have prompted them to do so." In contrast, petitioner's "attorneys conducted a much greater investigation, but their interviews with their client and his family provided a reasonable basis for concluding that additional investigation would not have represented a wise allocation of limited resources." J.A. 1372.

b. Judge Sloviter dissented. In her view, petitioner's trial counsel had a duty to "inquire further as to the availability of [petitioner's] other family members," because those that counsel interviewed hardly knew petitioner. In addition, Judge Sloviter faulted the attorneys for relying on mental health experts "to determine the records needed to evaluate [petitioner's] mental health," stating that "[c]ounsel cannot so easily shed their constitutional obligations." Finally, Judge Sloviter observed that petitioner's counsel were generally deficient for failing to find the abundant records suggesting that petitioner had a troubled background and a mental impairment. J.A. 1419-1420, 1423.

The court of appeals denied petitioner's petition for rehearing or rehearing en banc. J.A. 1448-1453.

SUMMARY OF ARGUMENT

A. Under *Strickland* v. *Washington*, 466 U.S. 668 (1984), courts considering ineffective assistance of counsel claims must accord a high degree of deference to counsel's performance and presume that counsel had a sound strategic justification for litigation choices. *Strickland* requires counsel to conduct an objectively reasonable pre-trial investigation, but the investigation need not be unlimited in depth or scope. Rather, counsel may make "reasonable professional judgments" to forgo certain investigatory steps, and in particular, the scope of the investigation "may be determined or substantially influenced by the defendant's own statements or actions." *Id.* at 691. For example, "when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Ibid.*

In this case, defense counsel conducted a reasonable investigation into petitioner's family background and mental health by hiring three mental health experts to evaluate petitioner and interviewing, at length, petitioner, three of his siblings, his ex-wife, and a sister-in-law. The consistent results of counsel's investigations were that nothing about petitioner's mental health or background would contribute to the mitigation case. Defense counsel's conclusion that further investigation into petitioner's records would be fruitless was thus supported by a broad investigation and reasonable professional judgment. In addition, counsel's investigation was reasonable, because petitioner expressly and repeatedly represented to counsel that his mental

health and background were not viable areas for mitigation evidence.

B. Petitioner and the American Bar Association (ABA) suggest that this Court's decision in *Wiggins* v. *Smith*, 539 U.S. 510 (2003), and the ABA standards cited in that case, require capital counsel to obtain a defendant's reasonably available records in all cases in an effort to develop a mitigation case. That contention is unsound. The ABA standards cited in *Wiggins* do not require capital counsel to acquire a defendant's records in all instances, regardless of the facts and other investigatory steps taken. Rather, the professional norm, as recognized in *Wiggins* and the ABA standards the Court cited, is for counsel to *make efforts to discover* all reasonably available evidence by, first, conducting an interview with the defendant and then, based on that interview, acquiring all *relevant* records—which is precisely what counsel did in this case. *Id.* at 525. Reading *Wiggins* more broadly, to impose an inflexible rule that counsel must always procure all reasonably available records, would render *Wiggins* inconsistent with this Court's decisions in *Strickland* and *Burger* v. *Kemp*, 483 U.S. 776 (1987), both of which recognized that courts may not impose rigid checklists on counsel but must evaluate an attorney's performance in view of the totality of circumstances, and both of which upheld investigations where counsel failed to seek the defendant's records after conducting interviews of the defendant and family members.

C. Petitioner's claim that his counsel's investigation revealed so many potential red flags that counsel should have gone on to acquire his records is factually unfounded. Counsel interviewed family members who should have had knowledge of the abuse petitioner now

claims and consulted three experts who were well qualified to evaluate petitioner's family background, abuse of alcohol, and mental state. No one hinted at a possible mitigation case. There were thus no red flags to warn counsel or to render their investigation unreasonable.

ARGUMENT

DEFENSE COUNSEL'S INVESTIGATION INTO POTENTIAL THEORIES OF MITIGATION WAS CONSTITUTIONALLY ADEQUATE

In *Strickland* v. *Washington*, 466 U.S. 668 (1984), this Court developed a two-prong test for determining whether counsel's performance was unconstitutionally ineffective under the Sixth Amendment: (i) the defendant must show that "counsel's representation fell below an objective standard of reasonableness"; and (ii) the defendant must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688, 694.

Petitioner contends that his counsel rendered ineffective assistance by failing to acquire all "reasonably available records" pertaining to him, "including records about his educational history, his prior adult and juvenile record, his prior correctional experience and his medical history." Pet. Br. 31 (internal quotations and citation omitted). Petitioner's contention should be rejected.[3]

[3] Because this case arises on federal habeas corpus, petitioner "must do more than show that he would have satisfied *Strickland*'s test if his claim were being analyzed in the first instance." *Bell* v. *Cone*, 535 U.S. 685, 698-699 (2002). Under 28 U.S.C. 2254(d)(1), petitioner "must show that the [Pennsylvania Supreme Court] applied *Strickland* to the facts of his case in an objectively unreasonable manner." 535 U.S. at 699. "[A]n unreasonable application is different from an incorrect one." *Id.* at 694. Because this brief explains why counsel's performance satisfied the constitutional requirements for effective assistance of counsel under *Strickland*, it follows *a fortiori* that the state court did not apply *Strickland* in an unreasonable manner within the meaning of Section 2254(d)(1).

A. Defense Counsel's Investigation Was Constitutionally Reasonable Under *Strickland*

1. Under Strickland, counsel must conduct an investigation that is reasonable in view of the totality of circumstances

In evaluating counsel's performance, this Court has repeatedly recognized that "[j]udicial scrutiny * * * must be highly deferential," with "every effort * * * be[ing] made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Bell* v. *Cone*, 535 U.S. 685, 698 (2002) (internal quotations and citation omitted). Otherwise, it is "all too tempting" for a convicted defendant to "second-guess counsel's assistance" and "all too easy" for a court to find an act or omission "unreasonable" because defense counsel was "unsuccessful." *Strickland*, 466 U.S. at 689. Accordingly, a court "must indulge a 'strong presumption' that counsel's conduct falls within the wide range of reasonable professional assistance." *Bell* v. *Cone*, 535 U.S. at 702 (quoting *Strickland*, 466 U.S. at 689).

Where a court is evaluating an attorney's pre-trial investigation, there is no "checklist for judicial evaluation of attorney performance." *Strickland*, 466 U.S. at 688. "[T]he Federal Constitution imposes [only] one general requirement: that counsel make objectively

reasonable choices." *Roe* v. *Flores-Ortega*, 528 U.S. 470, 479 (2000). Thus, counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. When counsel decides that an investigation is complete, the decision "must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Ibid.*

One circumstance that "may be critical to a proper assessment of counsel's investigation decisions" is "counsel's conversations with the defendant." *Strickland*, 466 U.S. at 691. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions," because "[c]ounsel's actions are usually based, quite properly, * * * on information supplied by the defendant." *Ibid.* Thus, "what investigation decisions are reasonable depends critically on such information," and "when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Ibid.*

Applying those standards, in *Strickland*, the Court rejected a defendant's claim that his counsel was deficient in failing to investigate his background and mental state, holding that "[t]rial counsel could reasonably surmise from his conversations with respondent that character and psychological evidence would be of little help." 466 U.S. at 690-691, 699. Similarly, in *Burger* v. *Kemp*, 483 U.S. 776 (1987), the Court concluded that a decision "not to mount an all-out investigation into petitioner's background in search of mitigating circumstances was supported by reasonable professional judgment," where counsel had "interview[ed] all potential witnesses who had been called to his attention," and the attorney reasonably believed that explaining petitioner's background to the jury "would not have minimized the risk of the death penalty." *Id.* at 794-795.

2. The decision not to obtain petitioner's records was reasonable in light of the totality of circumstances in this case

In view of the standards governing duty-to-investigate claims, the findings of the Pennsylvania Supreme Court, and the uncontradicted testimony at the PCRA hearing, defense counsel's investigation into petitioner's mental impairments and family background was reasonable notwithstanding counsel's failure to obtain petitioner's records.

The record demonstrates that defense counsel "retained three well-qualified mental health experts to examine [petitioner]." J.A. 1358. The experts performed "a battery of tests" for brain damage and personality disorders, but "found nothing helpful to [petitioner's] case." J.A. 263, 272, 1358. No expert suggested that petitioner's records were necessary to evaluate petitioner's mental state; to the contrary, all three experts completed their evaluations without asking for these records. J.A. 263-264, 1052-1056, 1082-1083.

In addition, defense counsel developed a relationship of "trust" with the petitioner before questioning him about his background (J.A. 555, 557-558), but petitioner persistently maintained to counsel, as well as his mental health experts (J.A. 1027, 1054), that he had a "normal" childhood and did not have a drinking problem. J.A. 1054. Petitioner's manner of discussing his family back-

ground gave no indication that he was withholding information from counsel. J.A. 668, 669. Counsel nonetheless checked and corroborated petitioner's claim of a normal childhood by questioning "in a detailed manner" three of petitioner's siblings, his sister-in-law, and his ex-wife about his background. J.A. 264. "[N]one * * * revealed abuse or other circumstances that could be used as mitigation evidence." J.A. 273. In light of these facts, defense counsel's conclusion that an investigation into petitioner's records would be fruitless "was supported by reasonable professional judgment." *Burger*, 483 U.S. at 794.

The reasonableness of the scope of counsel's investigation is underscored by petitioner's statements to his trial counsel. Petitioner expressly and repeatedly denied that anything in his background—his education, family history, or use of alcohol—could help the mitigation case. Because petitioner "[gave] counsel reason to believe that pursuing [these] investigations would be fruitless," he may not now challenge counsel's failure to investigate as unreasonable. *Strickland*, 466 U.S. at 691.

B. Neither This Court's Decision In *Wiggins* Nor The Prevailing Norms Require Capital Counsel To Obtain All Reasonably Available Records Without Regard To Relevance

Petitioner (Pet. Br. 31), the American Bar Association as *amicus curiae* (ABA Amicus Br. 12-16), and the dissenting judge in the court of appeals (J.A. 1422-1423) suggest that this Court's decision in *Wiggins* v. *Smith*, 539 U.S. 510 (2003), and the ABA's standards governing investigations in capital cases, require capital counsel to acquire a defendant's reasonably available records in all instances. Pet. Br. 31; see ABA Amicus Br. 12-14. That

argument, however, misreads both *Wiggins* and the ABA's standards.

In *Wiggins*, the Court held that defense counsel acted unreasonably by conducting only a narrow investigation into the defendant's family background and then abandoning the investigation after uncovering numerous leads. There, the investigation consisted of counsel's reviewing a pre-sentence investigation report (PSI) and records kept by the Baltimore City Department of Social Services (DSS records). These records revealed that the defendant's mother was an alcoholic, that defendant was "shuttled from foster home to foster home," and that the defendant displayed some emotional difficulties. Despite that information, counsel halted the investigation and gave up on using petitioner's family background as a mitigating factor. *Wiggins*, 539 U.S. at 525.

In holding counsel's investigation constitutionally deficient, the Court observed, first, that "[c]ounsel's decision not to expand their investigation beyond the PSI and the DSS records fell short of the professional standards that prevailed in Maryland in 1989." *Wiggins*, 539 U.S. at 524. The "standard practice in Maryland" at the time "included the preparation of a social history report." *Ibid.* In addition, the Court observed that the standards for capital defense attorneys articulated by the ABA provided that "investigations into mitigating evidence should comprise efforts to discover *all reasonably available* mitigating evidence." *Ibid.* (internal quotations and citations omitted). "Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Ibid.* The Court held, next, that the

scope of counsel's investigation "was also unreasonable in light of what counsel actually discovered in the DSS records," namely numerous "leads" indicating that petitioner's childhood was traumatic. *Id.* at 525. "Indeed, counsel uncovered no evidence in their investigation to suggest that a mitigation case, in its own right, would have been counterproductive, or that further investigation would have been fruitless." *Ibid.* Thus, "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses." *Ibid.*

Focusing on the first part of the Court's opinion and the Court's reliance on ABA standards, petitioner and the ABA claim that this Court requires counsel to procure and review all "'reasonably available' records" in all capital cases. Pet. Br. 31; ABA Amicus Br. 12-16. But neither the ABA Guidelines nor *Wiggins*, when fairly read, establishes a such duty.

The 1989 version of the ABA's *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (*1989 ABA Guidelines*) (set forth in the appendix to this brief, App., *infra*, 1a-5a), which the Court cited in *Wiggins*, established an overarching duty for counsel to conduct an "investigation for preparation of the sentencing phase" that "should comprise *efforts to discover* all reasonably available mitigating evidence." App., *infra*, 1a (emphasis added). It then identifies several potential "[*s*]*ources* of investigative information," the second of which is "[t]he accused." App., *infra*, 1a, 2a (emphasis added). Specifically, the ABA instructs counsel to conduct "[a]n interview of the client," as well as family members and friends (App., *infra*, 4a), to "collect information relevant to the sentencing phase of trial, including, but not limited to:

medical history[;] * * * educational history[;] * * * family and social history[;] * * * prior adult and juvenile record; [and] prior correctional experience." App., *infra*, 2a, 3a. While that subsection addresses the categories of *information* that should be covered in the client interview, it does not specifically address *records*. The next subsection addresses records and provides that counsel should also "seek necessary releases for securing confidential records," but that duty is expressly limited to securing releases for records "relating to * * * the *relevant* histories." App., *infra*, 3a (emphasis added).

The *1989 ABA Guidelines* did not prescribe a universal requirement to search out all records. Rather, the *1989 ABA Guidelines* specifically focused on counsel's acquiring "relevant" records, and relevance obviously can be shaped by what the defendant, and family members who know him, reveal about possible lines of mitigation.[4] When those sources reliably and consistently indicate that the defendant's background holds no promising mitigation evidence, counsel are not

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[4] See Nat'l Legal Aid & Defender Ass'n, *Standards for the Appointment and Performance of Counsel in Death Penalty Cases* 60-66 (1988) (providing same standard for investigation as is contained in *1989 ABA Guidelines*); *id.* at 67 (Commentary) (observing that "[c]lient interviews are vital for establishing the trust between attorney and client necessary to allow the attorney to learn the facts"); Subcommittee on Federal Death Penalty Cases, Committee on Defender Services, Judicial Conference of the United States, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* I.B.4(a) (May 1998) (*Federal Death Penalty Recommendations*) (observing that "consultation with the client" is important source for client's "[e]xperiences of mental illness, substance abuse, emotional and physical abuse, social and academic failure, and other 'family secrets' ").

required to acquire all records. Thus, the *1989 ABA Guidelines* contemplated that counsel would satisfy the duty to make "efforts to discover all reasonably available mitigating evidence" by discussing all potential theories of mitigation with the defendant and family members, and acquiring records that, based on those discussions, could be relevant.[5]

In any event, nothing in *Wiggins* purported to constitutionalize the ABA Guidelines or to overrule *Strickland*'s reasonableness test. In *Wiggins*, as in *Strickland*, this Court recognized that the ABA's standards are useful reflections of "[p]revailing norms of practice." *Strickland*, 466 U.S. at 688; *Wiggins*, 539 U.S. at 524. But the Court has repeatedly declined to treat the ABA's guides as the standard-bearers of reasonableness, observing more than once that "prevailing norms of practice as reflected in American Bar Association standards and the like are only guides, and imposing specific guidelines on counsel is not appropriate." *Roe* v. *Flores-Ortega*, 528 U.S. at 479 (internal quotations and citation omitted); see *Strickland*, 466 U.S. at 688 (observing that prevailing

[5] In federal death penalty cases, a "mitigation specialist" is "one of the more common experts" "requested by defense counsel," and the costs associated with hiring a mitigation specialist are typically permitted under 21 U.S.C. 848(q)(9). Federal Judicial Center, I *Resource Guide for Managing Capital Cases* 14, 20-21 (Apr. 2004). The services performed by a mitigation specialist generally include "obtaining and evaluating birth, school, social welfare, employment, jail, medical, and other records"; "interviewing the defendant and his or her family and friends regarding sensitive areas of mitigation evidence"; and "analyzing drug and alcohol use history." *Id.* at 14. The use of mitigation specialists in federal death penalty cases, however, does not set a constitutional floor for effective assistance of capital counsel.

norms defined by the ABA "are only guides"); *Wiggins*, 539 U.S. at 524 (same). Thus, the Court has refused to hold that counsel are constitutionally required to consult with their client about the possibility of appeal, even though ABA and state standards generally require such a discussion. *Roe* v. *Flores-Ortega*, 528 U.S. at 479.

Indeed, however useful the ABA's standards may be as guides for counsel, they often exceed the constitutional minimum of reasonableness and, if viewed as immutable rules, could impose considerable, potentially fruitless, burdens on defense counsel—a point amply demonstrated by the ABA's current standards, which the ABA repeatedly cites in its brief (ABA Amicus Br. 9-14) for the proposition that capital counsel must always obtain all records relating to the defendant. See *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Feb. 2003) (*Current Guidelines*), *reprinted in* 31 Hofstra L. Rev. 913, 1024-1025 (2003).[6] Thus, while the ABA's standards may describe the ideal for defense counsel in considering a mitigation case, the standards

[6] The *Current Guidelines* require counsel to obtain and review not only all available records concerning the defendant but also all such records relating to the defendant's "parents, grandparents, siblings, cousins, and children, including school records, social service records, family court records, family birth, marriage and death records, medical records, employment records, military records, and INS records." See *Current Guidelines* 10.7, *reprinted in* 31 Hofstra L. Rev. at 1024-1025. But no court has suggested that such a broad and exhaustive records search is constitutionally required. Conducting such a search, indeed, could be an unreasonable use of counsel's time if no information suggests that, for example, a cousin's INS record is relevant to the mitigation case.

do not always define the constitutionally-required minimum.

Reading *Wiggins* more broadly, to require defense counsel to acquire all reasonably available records in every capital case, would render *Wiggins* irreconcilable with both the analytical framework and the results in *Strickland* and *Burger*. The legal framework developed in *Strickland* disavowed the view that inflexible rules govern counsel's performance; it instead requires the evaluation of an attorney's challenged conduct "on the facts of the particular case, viewed as of the time of counsel's conduct," and not against a "checklist for judicial evaluation of attorney performance." 466 U.S. at 688, 690. The Court observed that adopting a "particular set of detailed rules for counsel's conduct" would undercut the goals of the Sixth Amendment. *Id.* at 688. Because no single set of standards "can satisfactorily take account of the variety of circumstances faced by defense counsel," any such rules would "restrict the wide latitude counsel must have in making tactical decisions" and "interfere with the constitutionally protected independence of counsel." *Id.* at 688-689. Thus, this Court has "consistently declined to impose mechanical rules on counsel—even when those rules might lead to better representation." *Roe* v. *Flores-Ortega*, 528 U.S. at 481.

In both *Strickland* and *Burger*, moreover, counsel failed to acquire the defendant's records when investigating potential mitigating circumstances, but the Court upheld counsel's investigation as reasonable under the circumstances. In *Strickland*, the Court described defense counsel's investigation into the defendant's family background as consisting of only discussions with the defendant "about his background," and telephone conversations with the defendant's wife

and mother. 466 U.S. at 672-673. Counsel "did not otherwise seek out character witnesses" and did not request a psychiatric examination of his client. *Id.* at 673. The Court concluded that this conduct could not "be found unreasonable" in light of the standards it had adopted. *Id.* at 698. Similarly, in *Burger*, defense counsel's "investigation" consisted only of roughly six-hours of interviews with the defendant, "talk[s]" with the defendant's mother "on several occasions," discussions with an attorney who had befriended the defendant, and a review of a report by a single psychologist who counsel had hired. 483 U.S. at 790-791 & 791 n.8. While observing that "[t]he record at the habeas corpus hearing does suggest that [counsel] could well have made a more thorough investigation," the Court held that counsel's decision to end the investigation was "reasonable." *Id.* at 794-795.

Wiggins does not purport to displace *Strickland* and *Burger*. To the contrary, the Court reconciled the three cases by observing that, in *Strickland* and *Burger*, counsel "uncovered no evidence" to suggest that "further investigation would have been fruitless." *Wiggins*, 539 U.S. at 525. *Wiggins* involved, in contrast, defense counsel who conducted only a "rudimentary" investigation, and then abandoned the investigation when even the rudimentary steps they took pointed to significant mitigation evidence. *Id.* at 524-525. *Wiggins* thus does not mandate that counsel who turn up no leads after conducting significant investigations of the defendant's background nevertheless must go on to obtain all reasonably available records.

C. Unlike The Investigation In *Wiggins*, The Investigation In This Case Revealed That Further Investigation Would Have Been Fruitless

Contrary to petitioner's final claim (Pet. Br. 32-36), there were no red flags signaling that further investigation into petitioner's mental health and background was necessary. The investigation here was much broader than the investigation in *Wiggins* and failed to uncover any "leads." Petitioner insisted that his childhood was "normal" and that he was not an alcoholic; his family members failed to reveal any abuse or anything else about the family that could be used in mitigation; and three mental health professionals concluded that petitioner had no mitigation case. See pp. 17-18, *supra*.

Petitioner nonetheless attempts to fit this case within *Wiggins* by arguing that counsel "knew" six facts that should have prompted further investigation: (i) the family members they interviewed had "only a rudimentary knowledge" of petitioner; (ii) petitioner's adult and juvenile criminal records likely contained life history and mental health information; (iii) petitioner left school after the ninth grade; (iv) police reports suggested that petitioner was drinking heavily the night of Scanlon's murder and could not drink as a condition of parole; (v) petitioner's "ability to adjust to prison life" could be a mitigating factor; and, (vi) the Commonwealth of Pennsylvania would seek to introduce evidence of his prior crimes as part of its aggravation case. Pet. Br. 33- 36. These six purported "leads," however, are factually unfounded or legally irrelevant.[7]

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[7] The ABA also suggests that petitioner's family members were uncooperative. ABA Amicus Br. 18-21. That claim, however, lacks support in the record and is inconsistent both with the undisputed testimony that petitioner and his family members were not recalcitrant but had a "very close" relationship with defense counsel and appeared to be forthcoming, and the PCRA court's findings that counsel had, in fact, "spoke[n] with members of the family in a detailed manner." See J.A. 264, 555, 557-558, 668-669.

First, petitioner is wrong to claim (Pet. Br. 32-33) that defense counsel interviewed family members with only "rudimentary knowledge" of the *relevant* background. Some family members did suggest that, because of petitioner's many years in prison, they did not know petitioner that well. J.A. 495. But the interviewed family members were both younger and older than petitioner and lived in the same household as petitioner during his childhood. J.A. 1372. Thus, with respect to the questions put to them—about the conditions of petitioner's life while he resided at home as a child—the family members were undoubtedly the most promising source of information, notwithstanding their distance from petitioner later in life. Indeed, the record establishes that, instead of denying knowledge of the relevant issue, the interviewed family members *answered* questions defense counsel put to them about petitioner's family life and background. See J.A. 498-499; pp. 6-7, 18, *supra*. In addition, at least one of the interviewed siblings had actual knowledge of "the conditions in the home on which [petitioner] now relies, but he never provided that information to trial counsel." J.A. 1372. Accordingly, with respect to the relevant line of inquiry, the interviewed family members were knowledgeable.

Second, the suggestion (Pet. Br. 33-34) that defense counsel should have obtained petitioner's adult and juvenile criminal records for "life history and mental health information" incorrectly assumes that counsel

lacked any other source for that information. But defense counsel were able to investigate petitioner's life history and mental health with petitioner, his family members, and three experts, and had no reason to believe that petitioner's criminal records would supply any new information. See pp. 17-18, *supra*. The two cases petitioner cites (Pet. Br. 33-34) for the proposition that Pennsylvania records may contain useful information, moreover, do not hold that such records are necessarily more useful than interviews by counsel and experts, and certainly do not impose an inflexible duty on capital counsel to obtain the reports when investigating mitigation evidence. See *Pennsylvania* v. *Martin*, 351 A.2d 650, 657-659 (Pa. 1976); *Pennsylvania* v. *Hodovanich*, 251 A.2d 708, 710 (Pa. Super. Ct. 1969).

Third, the record demonstrates that petitioner's leaving high school was not a red flag requiring further investigation in the circumstances of this case (Pet. Br. 34). Undisputed evidence in the record shows that Dr. Gross was aware of petitioner's failure to complete high school, found the fact unremarkable, and failed to request petitioner's school records, all of which suggests that petitioner's high school experience was not viewed as a promising lead to the well-qualified mental health expert. See J.A. 1054 (observing that petitioner left school, because "he wanted to work"). Dr. Sadoff, moreover, stated that pulling the school records of a 40-year-old defendant, like petitioner, is unnecessary unless there are inconsistencies between the results of expert testing and the defendant's statements about his education. J.A. 1120-1121. Because petitioner's failure to graduate from high school was consistent with his low-average intelligence revealed by expert testing (see J.A. 1083), petitioner's leaving school was consistent with what the experts knew.

Fourth, the facts that police reports indicated that petitioner had been drinking heavily on the night of Scanlon's murder and that petitioner had agreed not to drink as a condition of parole (Pet. Br. 34) do not render defense counsel's investigation unreasonable, because counsel investigated the possibility that petitioner abused alcohol. See pp. 6-8, 17-18, *supra*. The uniform conclusion of mental health experts, petitioner and his family members, however, was that petitioner was not an alcoholic. *Ibid.* On these facts, there was no imperative for counsel to consult, as petitioner suggests (Pet. Br. 34), petitioner's court and prison records for evidence of petitioner's use of alcohol.

Fifth, contrary to petitioner's claim (Pet. Br. 35), defense counsel had no duty to investigate petitioner's prison records for mitigating evidence about petitioner's ability to adjust to prison life. The record, again, demonstrates that defense counsel conducted extensive interviews with petitioner in which information about petitioner's life in prison should have been uncovered. See pp. 6-8, 17-18, *supra*.

Finally, petitioner's (Pet. Br. 35-36) and the ABA's (ABA Amicus Br. 16-18) reliance on defense counsel's investigation into the State's aggravation case is misplaced. Petitioner does not claim that defense counsel was constitutionally deficient in defending against the State's *aggravation* evidence. Nor can he. The record demonstrates that counsel put on a spirited defense over the relevance and prejudice of the primary aggravation evidence the State introduced. See J.A. 16-40 (arguments concerning State's introduction of evidence about circumstances of petitioner's prior felony conviction), 100-104 (cross-examination of state forensic expert). Petitioner fails to explain, moreover, how review of his prison records would have assisted

counsel. The State argued that petitioner had previously committed a felony involving the use of violence. Petitioner's prison records and juvenile records were simply not relevant to understanding whether this crime was violent. Accordingly, the consistent result of defense counsel's investigation was that further investigation would have been fruitless.

CONCLUSION

The judgment of the Third Circuit should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

CHRISTOPHER A. WRAY
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

TRACI L. LOVITT
Assistant to the Solicitor General

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APPENDIX

American Bar Association, *Guidelines for the Appointment and Performance of Counsel In Death Penalty Cases* (1989).

GUIDELINE 11.4.1 INVESTIGATION

A. Counsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial. Both investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously.

B. The investigation for preparation of the guilt/innocence phase of the trial should be conducted regardless of any admission or statement by the client concerning facts constituting guilt.

C. The investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.

D. Sources of investigative information may include the following:

1. Charging Documents:

   Copies of all charging documents in the case should be obtained and examined in the context of the applicable statues and precedents, to identify (*inter alia*):

A. the elements of the charged offense(s), including the element(s) alleged to make the death penalty applicable;

B. the defenses, ordinary and affirmative, that may be available to the substantive charge and to the applicability of the death penalty;

C. any issues, constitutional or otherwise, (such as statutes of limitations or double Jeopardy) which can be raised to attack the charging documents.

2. The Accused:

An interview of the client should be conducted within 24 hours of counsel's entry into the case, unless there is a good reason for counsel to postpone this interview. In that event, the interview should be conducted as soon as possible after counsel's appointment. As soon as is appropriate, counsel should cover A-E below (if this is not possible during the initial interview, these steps should be accomplished as soon as possible thereafter):

A. seek information concerning the incident or events giving rise to the charge(s), and any improper police investigative practice or prosecutorial conduct which affects the client's rights;

B. explore the existence of other potential sources of information relating to the offense, the client's mental state, and the presence or absence of any aggravating factors under the applicable death penalty statute and any mitigating factors;

C. [c]ollect information relevant to the sentencing phase of trial including, but not limited to: medical history, (mental and physical illness or injury of alcohol and drug use, birth trauma and developmental delays); educational history (achievement, performance and behavior) special educational needs including cognitive limitations and learning disabilities); military history (type and length of service, conduct, special training); employment and training history (including skills and performance, and barriers to employability); family and social history (including physical, sexual or emotional abuse); prior adult and Juvenile record; prior correctional experience (including conduct or supervision and in the institution/education or training/clinical services); and religious and cultural influences.

D. seek necessary releases for securing confidential records relating to any of the relevant histories.

E. [o]btain names of collateral persons or sources to verify, corroborate, explain and expand upon information obtained in (c) above.

3. Potential Witnesses:

Counsel should consider interviewing potential witnesses, including:

A. eyewitnesses or other witnesses having purported knowledge of events surrounding the offense itself;

B. witnesses familiar with aspects of the client's life history that might affect the likelihood that the client committed the charged offense(s), possible mitigating reasons for the offense(s), and/or other mitigating evidence to show why the client should not be sentenced to death;

C. members of the victim's family opposed to having the client killed. Counsel should attempt to conduct interviews of potential witnesses in the presence of a third person who will be available, if necessary, to testify as a defense witness at trial. Alternatively, counsel should have an investigator or mitigation specialist conduct the interviews.

4. The Police and Prosecution:

Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports. Where necessary, counsel should pursue such efforts through formal and informal discovery unless a sound tactical reason exists for not doing so.

5. Physical Evidence:

Where appropriate, counsel should make a prompt request to the police or investigative agency for any physical evidence or expert reports relevant to the offense or sentencing.

6. The Scene:

Where appropriate, counsel should attempt to view the scene of the alleged offense. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (*e.g.* weather, time of day, and lighting conditions).

7. Expert Assistance:

Counsel should secure the assistance of experts where it is necessary or appropriate for:

A. preparation of the defense;

B. adequate understanding of the prosecution's case;

C. rebuttal of any portion of the prosecution's case at the guilt/innocence phase or the sentencing phase of the trial;

D. presentation of mitigation. Experts assisting in investigation and other preparation of the defense should be independent and their work product should be confidential to the extent allowed by law. Counsel and support staff should use all available avenues including signed releases, subpoenas, and Freedom of Information Acts, to obtain all necessary information.